No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

W. S. D. SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

CHARLES P. MORIARTY,
STANLEY J. PADDEN,
Counsel for Petitioner.

1212 American Building,
Seattle 4, Washington.

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The basic issue presented to the court below was whether the following statute is applicable to respondent's action.

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained except in cases where it is otherwise specifically provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."
>
> Title 28, U.S.C.A., Sec. 791.

This statute was a part of a general act enacted on February 28, 1839, and which is captioned an act in amendment of the acts representing the judicial system of the United States and is Section 4 thereof. We have set forth all of the provisions of the act in the appendix.

The Circuit Court in its opinion did not deem that

the statute was applicable, and announced its conclusions in the following words:

> "The quoted federal statute on which appellant leans is found in its present form in R.S. §1047. It appears to have had its genesis in the Act of March 2, 1799, 1 Stat. 627, c. 22, regulating the collection of duties on imports and tonnage. Section 89 of this Act provided in what manner 'penalties, accuring by any breach' of the act should be sued for. This section concluded with a proviso to the effect that 'no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred.'
>
> "It is clear from the text of the 1799 Act that the phraseology relating to the 'accrual' or 'incurring' of the penalty or forfeiture has reference only to the commission of the act or offense by which the penalty or forfeiture was incurred. Similar verbiage is found in other limitation statutes of the period." (R. 49)

It is our contention that the court is in error because the 1799 Act referred to a specific subject, while the Act of February 28, 1839, passed subsequently was a general act covering all causes of actions. This is fully discussed in the case of *U. S. v. Maillard*, 26 Fed. Cas. 1140, case No. 15,709. The relevancy of the 1799 Act was not a subject of discussion in the briefs or arguments of counsel, but was introduced by the court in its opinion.

The court in its opinion further stated, "verbiage of existing statute, that is to say the phrase, 'time when the penalty or forfeiture accrued,' has refer-

ence merely to the commission of the offense and the doing of the act for which the penalty or forfeiture was incurred" (R. 50) We cannot agree with this reasoning for at the time of the commission of the offense no one could tell what amount might be due, if anything, until the conviction had occurred, and then only if a fine was imposed. The petitioner might have been acquitted. The sentence might have been for imprisonment only, and the penalty of fine was ascertained when the 1924 judgment was imposed, and the respondent was then possessed of an enforceable legal right and the statute was then applicable. Some questions may arise in regard to the fact that the word "fine" is not specifically mentioned in the statute. Penalty is a generic term, it has been applied to civil and criminal proceedings. It has been held to include both fine and forfeiture, but it generally has been understood as an exaction demanded by the state for an infraction of its laws. The father of our jurisprudence placed it in the criminal branch and the profession generally has spoken of the "Penalty of the law" when referring to the punishment inflicted upon a wrongdoer. A fine certainly is punishment. Imprisonment is also punishment. The appellant was sentenced to these penalties. How can it be said which part of his sentence was a penalty and which part was not penalty. The judgment was his penalty. We do not desire to burden the court with extensive quotations, but content ourselves with the following cases which support our contention that "a fine is always a penalty, although a penalty is not always a fine."

Lipke v. Lederer, 259 U.S. 557, 42 S. Ct. 549, 66 L. ed. 1061;

Regal Drug Corp. v. Wardell, 260 U.S. 386, 43 S.Ct. 152, 67 L. ed. 318;

Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L. ed. 1123;

St. Louis, I. M. & S. R. Co. v. Williams, 251 U.S. 63, 40 S. Ct. 71, 64 L. ed. 139;

Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198;

Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L. ed. 1232;

Life & Casualty Ins. Co. v. McCray, 291 U.S. 566, 78 L. ed. 987;

U. S. v. Constantine, 296 U.S. 287, 80 L. ed. 233;

United States v. Smith, Kline & French Co. (D. C.) 184 Fed. 532;

U. S. v. Springer & Lotz, 4 F. Supp. 253;

Schick v. U. S., 195 U.S. 65, 49 L. ed. 99;

U. S. v. Tsokas, 163 Fed. 129;

U. S. v. Moore, 11 Fed. 248.

It is our contention that the cited statute placed a time limit upon the enforcement of the judgment. It may be noted that this action is based on a judgment of fine, for it appears to us it is a "suit" or a "prosecution" for a "penalty." Again it may be suggested that if the Circuit Court's reasoning that no time limit is fixed for the enforcement of a penal judgment is correct, then there is at the present time a judgment in full force and effect in California against the petitioner and another judgment for the

same offense in the United States District Court for Western Washington. Both are for the same violations. If there is no time limit for the enforcement of a penal judgment, then the California judgment is valid and subsisting and could be executed upon, and the Washington judgment is also subject to the same process. This could cause a very unjust result. We see no necessity of making an exception for a penal judgment in the case because the wording of the pertinent statute has only one exception, and that is, "except in cases where it is otherwise specifically provided." We have found no specific provision in the statutes for the continuance of penal judgments and we do not believe the court should engraft upon a statute of limitation an exception which the statute itself does not make.

We do not believe the *Schodde* and *McCutcheon* cases *supra*, which the trial court relied on and the decisions referred to in the circuit court's opinion are in point as they involve limitations on civil action and did not consider the five-year "penalty" statute.

Chief Justice Marshall in discussing in an early case under a penal statute, whether an action of debt could be maintained without limitation, when the information was barred by the statute of limitation, stated

> "In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it

could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

Adams v. Woods, Cranch 2 (U.S.) 336, 2 L. ed. 297.

This case has more than passing significance. It involves not only this party, but all others who have transgressed the law and have later restored themselves to good citizenship. It involves the rights of every poor and indigent prisoner who comes before the courts in the future. The theory of our punishment of law violation is to permit the party to pay his debt to society and then start over a new life. The Circuit Court's decision, if allowed to stand, would have a depressing effect upon every prisoner in humble circumstances because it would create for him a continuing liability from which he could not escape. There would be no incentive for a prisoner to attempt to re-habilitate himself because all opportunity for such would be lost. The petitioner in this case was a pauper at the time of his conviction and the government took from him all his property, and it does not now claim that he concealed or withheld any funds or property at the time of his release from prison. It required him also to serve an additional thirty days before his discharge (R. 7). No credit in the judgment is allotted to the petitioner for this confinement. Liberty is a precious right and the petitioner served thirty days, but now receives no credit for it. Ordinarily we associate a fine with a minor offense. If the judgment is allowed to stand, the effect of it would be to make the fine a life time penalty. There is no reason to en-

graft an exception on the statute because of the fact the United States is a party for the reason that the Congress under our construction of the pertinent statute has legislated otherwise. The facts and circumstances of the case should have a peculiar appeal from the standpoint of human welfare. The Government should not be permitted to revisit on the petitioner, or any defendant, at so late a date penalties for a violation long since paid for.

Counsel for the petitioner certify that in their opinion this petition is well founded and is not interposed for delay.

It is respectfully submitted that this petition should be granted.

CHARLES P. MORIARTY,
STANLEY J. PADDEN,
Counsel for Petitioner.